Supreme Court, U.S.
FILED
FEB 3 - 2010
OFFICE OF THE CLERK

No. 09-789

In The Supreme Court of the United States

UNISYS CORPORATION,

Petitioner,

v.

HARLEY J. ADAIR, *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

Of Counsel:
ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

HOLLIS T. HURD
(*Counsel of Record*)
THE BENEFITS DEPARTMENT
3 Penn Center West, Suite 120
Pittsburgh, PA 15276
Hollis.Hurd@BenefitsDepartmentLawFirm.com
(412) 788-2334

Counsel for Chamber of Commerce of the United States of America

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Unisys Corporation. The Chamber is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants. Accordingly, the Chamber has participated *amicus curiae* in the following ERISA cases recently heard by this Court: *Conkright v. Frommert*, No. 08-810 (argued January 20, 2010), *Metropolitan Life Ins.*

Co. v. Glenn, ___ U.S. ___ (2008), *LaRue v. DeWolff, Boberg & Associates, Inc.*, ___ U.S. ___ (2008).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to unanticipated liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for many prior years. We believe this Court's review is urgently needed.

Counsel of record received timely notice of intent to file this brief (on January 15, 2010). Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

HOLLIS T. HURD
(*Counsel of Record*)
THE BENEFITS DEPARTMENT
3 Penn Center West,
Suite 120
Pittsburgh, PA 15276
(412) 788-2334

Of Counsel:
ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

The Question Presented Is Exceptionally Important Because The Answer Given Below Throws Into Doubt The Terms Of Millions Of Employee Benefit Plans, Visiting Enormous Unintended Costs On Employers And Burdening The Federal Courts With A New Class Of ERISA Litigation 6

A. The Decision Below Calls into Question the Validity of Amendments Made Over Many Years to Employee Benefit Plans under ERISA, Principally Health and Welfare Plans 7

B. The Decision Below Affects Virtually All Employee Benefit Plans under ERISA – Numbering in the Millions – Because Plan Administrators Have Never Observed Any Such Rule As It Would Impose 11

C. The Decision Below Contradicts the Purpose of ERISA By Imposing Upon Employers Significant Costs Not Intended By Congress and Will Burden the Federal Courts With a New, Entirely Unnecessary Class of ERISA Litigation 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Curtis-Wright v. Schoonejongen, 514 U.S. 73 (1995) ..... *passim*

District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992) 17

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 17

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 109 (1989) 20

FMC Corp v. Holliday, 498 U.S. 52 (1980) 17

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 12

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 17, 22

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 17

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 17

STATUTES

ERISA sec. 3(1), 29 U.S.C. § 1002(1) 14

ERISA sec. 102(a), 29 U.S.C. § 1022(a) 12

ERISA sec. 102(b), 29 U.S.C. § 1022(b) 13

ERISA sec. 104(a)(1)(B), 29 U.S.C. § 1024(b)(1)(B) 12

ERISA sec. 104(b), 29 U.S.C. § 1024(b) 12

TABLE OF AUTHORITIES – Continued

Page

ERISA sec. 104(b)(2), 29 U.S.C. § 1024(b)(2).....13

ERISA sec. 104(b)(4), 29 U.S.C. § 1024(b)(4).....13

ERISA sec. 204(g), 29 U.S.C. § 1054(g).....16

ERISA sec. 402(a)(1), 29 U.S.C. § 1102(a)(1).....12, 18

ERISA sec. 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).....18

ERISA sec. 502(c)(1), 29 U.S.C. § 1132(c)(1).....13

ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2).....20

Taxpayer Relief Act of 1997, P.L. 105-34, § 1503(c)(1).....12

OTHER

29 C.F.R. § 2520.102-3.....13

29 C.F.R. § 2520.102-3(l).....13

41 FR 16957.....12

63 FR 48378.....13

65 FR 70225.....13

65 FR 70246.....14

Private Pension Plan Bulletin, Abstract of 2007 Form 5500 Annual Reports (U. S. Department of Labor, January 2010) at Table A1.....15

INTEREST OF *AMICUS CURIAE*[1]

The Chamber is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Counsel of record received timely notice of intent to file this brief (on January 15, 2010, which is more than ten days prior to the due date). Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

litigants. Accordingly, the Chamber has participated *amicus curiae* in the following ERISA cases recently heard by this Court: *Conkright v. Frommert*, No. 08-810 (argued January 20, 2010), *Metropolitan Life Ins. Co. v. Glenn*, ___ U.S. ___ (2008), *LaRue v. DeWolff, Boberg & Associates, Inc.*, ___ U.S. ___ (2008).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to unanticipated liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for many prior years. We believe this Court's review is urgently needed.

SUMMARY OF ARGUMENT

In the decision below, the Third Circuit held that a fiduciary of an ERISA-covered employee benefit plan, such as a plan administrator, breaches his fiduciary duty if he accurately describes the then-current terms of the plan in response to an inquiry from an employee but fails to remind the employee

that the employer has reserved the right to amend or terminate the plan. This is despite the fact that the comprehensive and detailed disclosure provisions of ERISA require only that such a reminder appear in the summary plan description, which is provided to all participants. The penalty for that breach, according to the Third Circuit, is that any amendment reducing the benefit (or terminating the plan) is unenforceable against that employee.

The holding of the Third Circuit is exceptionally important because it throws into doubt the terms of virtually all employee benefit plans covered by ERISA, and there are considerably more than 5 million of them. That is because virtually all of them have been amended repeatedly since ERISA was enacted (and many have been terminated), but plan administrators have never understood their responsibility to include the duty imposed by the decision below, namely, to remind employees in every oral and written communication that the employer has reserved the right to amend or terminate the plan. If it really is a breach of fiduciary duty not to remind employees in every discussion of benefits under the plan that the employer reserves the right to amend or terminate the plan, it is a breach that has been committed daily by the administrators of millions of employee benefit plans ever since ERISA was enacted.

The question presented is also exceptionally important because of how seriously it affects employee benefit plans. Absent such disclosures as the Third

Circuit now seeks to require, the decision below has the practical effect of "freezing" the various different terms of every plan at various different points in time with respect to various different participants, all based on the accident of who asked about what provisions at what times in the past. Under the decision below, instead of presenting a coherent picture of the benefits to which all participants are entitled, the plan document under ERISA is suddenly exploded into a pixelated mishmash of different benefits frozen in time for different participants. And plans previously thought terminated may be resurrected simply because employees were not orally advised of the employer's reserved right to terminate the plan.

The national uniformity which is the capstone of ERISA, and the supremacy of the written plan document, will be shattered as employees and retirees institute claims that they must be afforded benefits without regard to particular plan amendments (or even termination of the plan) because they were never advised of the employer's reserved right to amend or terminate the plan when they made inquiries about their benefits. This will draw plan administrators into expensive investigations of who told whom what and when. It will also inevitably spill over into the federal courts either as employees and retirees press their claims or as plan administrators exercise their right to seek instructions as to what the terms of their plans are.

For the future, plan administrators will face an equally unappetizing prospect. They must (i) stop communicating with employees except through the statutory methods such as the summary plan description, or (ii) they must compel their staffs to issue Miranda-type warnings, in every oral and written communication with a participant, that the employer reserves the right to amend or terminate the plan, or (iii) they must adopt a policy of handing out another copy of the summary plan description every time they communicate with a participant – an expensive and wasteful predicament in which Congress could never have intended to place administrators.

Put simply, if the terms of virtually all welfare plans (and many pension plans) are presently uncertain without individualized inquiry into which amendments can be applied to which employees, depending on what they were told and when, *plan administrators need to know now*. And, for the future, if their fiduciary duty under ERISA requires the wasteful, duplicative disclosures necessitated by the decision below, *plan administrators need to know now*.

ARGUMENT

THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT BECAUSE THE ANSWER GIVEN BELOW THROWS INTO DOUBT THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, VISITING ENORMOUS UNINTENDED COSTS ON EMPLOYERS AND BURDENING THE FEDERAL COURTS WITH A NEW CLASS OF ERISA LITIGATION.

In the October 1994 Term, the Court granted *certiorari* and reversed a decision of the U. S. Court of Appeals for the Third Circuit that cast into doubt the terms of virtually all single-employer employee benefit plans covered by ERISA, by calling into question the validity of plan amendments that had been made to them over many years. *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995). Literally millions of employee benefit plans were affected, and the Third Circuit's decision would have imposed enormous unintended costs on employers large and small, as well as stimulating a flood of ERISA lawsuits in the federal courts.

Utilizing a different theory this time, the Third Circuit has once again cast into doubt the terms of millions of employee benefit plans covered by ERISA, once again by calling into question the validity of plan amendments that have been made to them over many years. The Chamber of Commerce of the United States of America (the "Chamber") wholeheartedly agrees with Petitioner as to the conflict among the Circuits and the plain error of the decision below. We

write separately, as we did in *Curtiss-Wright*, in order to bring to the Court's attention the tremendously harmful effect of the decision below on employers, large and small, and the employee benefit plans that they maintain, as well as the threat to the federal courts.

A. The Decision Below Calls into Question the Validity of Amendments Made Over Many Years to Employee Benefit Plans under ERISA, Principally Health and Welfare Plans.

The decision below holds that, if a plan administrator or other fiduciary of an ERISA-covered employee benefit plan accurately describes a then-current benefit of the plan to an employee but fails to remind the employee that the plan can be changed at any time, then that benefit cannot thereafter be taken away from that employee, even through the exercise of a properly reserved right to amend or terminate the plan. In this case, the employees inquired about post-retirement health coverage and were accurately told the then-current terms of the plan – that the benefit lasted throughout retirement and came at low cost to the retiree. Moreover, at that time, there was no intention to change the terms of the plan.

Years later, the employer chose to exercise its right to amend or terminate the plan by replacing it with a new plan, in which retirees were charged for

their health coverage in increasing stages over a period of years until eventually retirees would be paying the full cost. All along, the right to amend or terminate had been properly reserved in the plan document in accordance with this Court's decision in *Curtiss-Wright v. Schoonejongen* and properly disclosed to participants in the summary plan description as required by ERISA. But, in answering the employees' questions years earlier, the employer had not reminded the employees that the plan could be amended at any time. Accordingly, the Third Circuit held that the employer had forfeited its right to replace the plan with another so as to increase the charge due from these employees, meaning that the employer had to continue to provide these employees with vested, low-cost retiree health insurance notwithstanding its reserved right to amend or terminate the plan.

Thus, according to the Third Circuit, the critical right to amend or terminate an employee benefit plan, even if properly reserved in the plan document and disclosed to employees in the summary plan description as required by ERISA, is permanently lost as to any given employee who asks about the plan and is given an accurate answer but is not reminded in the same breath of the employer's right to amend or terminate. The applications of this new doctrine are almost limitless:

– An applicant asks at the job interview whether the health plan pays for transplants, because his wife may need one shortly. The employer's representative

answers yes (because it does and there is no intention to change the plan) but fails to add that the employer reserves the right to amend the plan. The applicant takes the job, preferring it to other offers because of coverage for transplants. Three years later, the employer amends the plan to eliminate coverage for transplants. According to the Third Circuit, the plan must still cover a transplant for this employee's wife, in complete derogation of the plan amendment that was properly reserved, communicated and adopted.

– An employee asks what the long-term disability benefit is. The employer's representative says, "66-2/3 percent of pay until age 65," because that is what the plan provides, but fails to add that the employer reserves the right to amend the plan. Later, the employer amends the long-term disability plan to reduce the benefit to 60 percent of pay until age 65. This employee, having foregone other employment opportunities, suffers long-term disability. According to the Third Circuit, because the employer did not remind the employee of the employer's reserved right to amend the plan, the pre-existing terms of the plan continue to apply to this employee, who therefore gets a benefit of 66-2/3 percent of pay, notwithstanding the amendment.

– An employee asks what the rate of matching contributions is under the employer's 401(k) plan. The employer's representative says, "Dollar for dollar up to 6 percent of pay," because that is what the plan provides, but does not remind the employee that the employer reserves the right to amend the plan. The

employee foregoes other employment opportunities because of the rich matching contribution. Some years later, due to an economic downturn, the employer amends the 401(k) plan to eliminate the matching contribution. According to the Third Circuit, the employer must continue to match this employee's 401(k) contributions dollar for dollar up to 6 percent of pay, because, as to this employee, it has forfeited the right to amend the plan to reduce the rate of match.

Absent such disclosures as the Third Circuit now seeks to require, the decision below has the practical effect of "freezing" the various different terms of every plan at various different points in time with respect to various different participants, all based on the accident of who asked about what benefits at what times in the past. Under the decision below, instead of presenting a coherent picture of the benefits to which all participants are entitled, the plan document under ERISA is suddenly exploded into a pixelated mishmash of different benefits frozen in time for different participants. What is more, plans that employers believe to have been terminated may now be resurrected as applied to certain employees or retirees, depending on an individualized investigation into what they were told on any historical occasion when they inquired about the terms of the plan.[2]

---

[2] The remedy in this case was precisely that – resurrecting a plan that had been properly terminated and replaced – as the Third Circuit recognized, characterizing the remedy as "reinstating the Burroughs Medical Plan for these twelve

(Continued on following page)

B. The Decision Below Affects Virtually All Employee Benefit Plans under ERISA – Numbering in the Millions – Because Plan Administrators Have Never Observed Any Such Rule As It Would Impose.

The theory adopted by the decision below is breach of fiduciary duty – that failure to remind the employee of the employer's reserved right to amend the plan when answering a question from the employee breaches the plan administrator's fiduciary duty to provide the employee with all information known to the plan administrator that might be important to the employee. It is tempting to view the case, therefore, as an isolated incident of breach of fiduciary duty. But that would be a mistake because, if this really is a breach of fiduciary duty, *it is a breach that has been committed daily by the administrators of millions of plans ever since the enactment of ERISA in 1974.*

Far from being isolated and fact-specific, the question presented affects virtually all employee benefit plans covered by ERISA, because plan administrators have never been aware of any requirement such as

---

plaintiffs and enjoining Unisys from making any changes to the plan." 34a. As this Court has observed, ERISA rests delicately atop a system where establishment and maintenance of employee benefit plans are voluntary. *Curtiss-Wright*, 514 U.S. 73, 78. But what employer would create an employee benefit plan if different employees could prevent the plan from being terminated as to them by reason of what they were told years before by the plan administrator?

the decision below would impose and, consequently, have never observed any such rule. No provision of ERISA imposes any such rule, despite its "comprehensive and reticulated" regulatory structure.[3] No regulation of any agency under ERISA imposes any such rule. No administrative ruling or guidance of any sort imposes any such rule.

What ERISA does require is that the plan administrator distribute a "summary plan description" to participants. ERISA secs. 102(a), 104(b), 29 U.S.C. §§ 1022(a), 1024(b).[4] Both the statute and

---

[3] "[B]ecause ERISA is a 'comprehensive and reticulated statute,' *Nachman*, 446 U.S., at 361, and is 'enormously complex and detailed,' *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993), it should not be supplemented by extra-textual remedies, such as the common-law doctrines advocated by respondents." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999). Even if one were to look to the common law of trusts for supplementation, however, our research has failed to uncover any analog in the common law for the rule announced by the Third Circuit.

[4] The hierarchy of documents under ERISA as originally enacted was first the plan document, then the "plan description," and finally the "summary plan description." The plan document contains all of the terms of the plan. ERISA sec. 402(a)(1), 29 U.S.C. § 1102(a)(1). The next step down, the "plan description," was a form developed by the Secretary of Labor, denominated Form EBS-1, in which the essential characteristics of the plan were identified. ERISA sec. 104(a)(1)(B) (as originally enacted), 41 FR 16957 (April 23, 1976). Then the bottom rung of the ladder was the "summary plan description."

The requirement of a "plan description" on Form EBS-1 was subsequently repealed by the Taxpayer Relief Act of 1997 (P.L. 105-34, sec. 1503(c)(1), leaving only the plan document and the

(Continued on following page)

the regulations require that the summary plan description include a description of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," which the Department of Labor has always understood as including disclosure of the right to amend or terminate the plan. ERISA sec. 102(b), 29 U.S.C. § 1022(b); 29 C.F.R. § 2520.102-3(l); 63 FR 48378, item 3 (September 9, 1998).[5] This is the mechanism by which ERISA requires that participants be informed of the employer's reserved right to amend the plan, and the mechanism spells out in detail who gets the summary plan description, when, how, and what it contains.[6] *Ibid.*

---

summary plan description. By regulation, the summary plan description has subsequently grown in stature and size nearly to equal the plan document, requiring over 4,600 words just to list the required contents. 29 C.F.R. § 2520.102-3.

[5] More than a decade after the events at issue in this case, in November 2000, the U. S. Department of Labor amended the regulation to clarify that the summary plan description must include "a summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate benefits under the plan . . . " 29 C.F.R. § 2520.102-3(l); 65 FR 70225 (November 21, 2000).

[6] Besides the affirmative obligation to provide the summary plan description spontaneously to all participants, the plan administrator has an obligation (i) to make the full plan document available at convenient locations and (ii) to provide a written copy of the full plan document to any participant on written request, within 30 days, subject to severe penalties. ERISA secs. 104(b)(2), (4), 29 U.S.C. § 1024(b)(2), (4); ERISA sec. 502(c)(1), 29 U.S.C. § 1132(c)(1). These are alternate mechanisms by which a participant can become informed about a reserved right to amend or terminate.

As a result, plan administrators *do* faithfully include in their summary plan descriptions an explanation of the sponsor's reserved right to terminate or amend the plan but they do *not* make a practice of reminding participants in every oral or written communication that the employer has reserved the right to terminate or amend the plan. A requirement that they do so would affect virtually every employee benefit plan under ERISA because virtually all of them have been repeatedly amended over the years. If those amendments are invalid as to those participants who inquired about their benefits but were never reminded, as part of the response, that the employer reserved the right to amend the plan, the terms of virtually all plans are in doubt, and there are literally millions of them.

"Welfare" plans provide health benefits (including medical, dental, vision and prescription drug), short- and long-term disability, life insurance, supplemental unemployment benefits, and severance pay, among others. ERISA sec. 3(1), 29 U.S.C. § 1002(1). According to the U. S. Department of Labor, in 2000 there were 2.8 million health plans alone, plus another 1.7 million disability plans.[7] (The number of life insurance, supplemental unemployment benefit and severance pay plans is not reported.) In addition, in

---

[7] Final regulations on benefit claim procedures, "Economic Costs of the Regulation," at Table 3 (U. S. Department of Labor), 65 FR 70246 (November 21, 2000).

2007 there were nearly 708,000 pension plans.[8] Thus, considerably more than 5 million plans are affected by the decision below.

Moreover, employee benefit plans undergo regular and, in many cases, constant amendments. In health plans, such as the plan at issue, amendments are an annual occurrence, and many of those amendments are adverse to the interests of employees. Any increase in the employee contribution, deductibles or copays is adverse to the interests of employees, yet such amendments are made almost every year in most plans. Plans regularly adjust coverage of particular procedures (such as substance abuse) or particular drugs (such when a generic equivalent becomes available), as well as annual and lifetime maximums. Indeed, the very act of instituting managed care, which has been widely credited with holding down the cost of health care over the past decade, constitutes a plan amendment adverse to the interests of the employees (by limiting reimbursements if they receive care outside the managed care network, for example).

Aside from a relative handful of brand new plans, it is doubtful that there is any employee benefit plan covered by ERISA that has not been amended repeatedly since ERISA. Yet the decision below would

---

[8] Private Pension Plan Bulletin, Abstract of 2007 Form 5500 Annual Reports (U. S. Department of Labor, January 2010) at Table A1.

allow employees to permanently "lock in" a lower rate of employee contributions, deductibles and copays, a higher annual or lifetime maximum, or entitlement to full reimbursement even if they received care outside the managed care network, if they were fortunate enough to have asked what the benefit was at some point in the past and been told accurately what it was at that time but were not simultaneously reminded of the employer's right to amend the plan.

Because amendments to welfare plans are annual occurrences and plan administrators have never observed a rule such as the decision below would impose, it is no exaggeration to say that the decision below would affect virtually all welfare plans covered by ERISA, exploding them into mosaics of different benefits frozen in time for different individuals, with most of the differences currently unknown to the plan administrator.[9] It would also resurrect – selectively, based on what different employees may have been told at different times – plans that employers thought they had terminated years ago.

---

[9] The effect on pension plans would be less but by no means negligible. For example, ERISA already prohibits defined benefit pension plans from cutting back accrued benefits. ERISA 204(g), 29 U.S.C. § 1054(g). But defined contribution pension plans, such as the 401(k) plans which have largely taken over the pension arena, would still be fully exposed to the effects of the decision below, as shown in the example earlier in the text, where an employer needs to cut back the rate of matching contribution during a period of economic downturn.

C. The Decision Below Contradicts the Purpose of ERISA By Imposing Upon Employers Significant Costs Not Intended By Congress and Will Burden the Federal Courts With a New, Entirely Unnecessary Class of ERISA Litigation.

This Court has recognized time and again the importance of national uniformity under ERISA, based on the supremacy of the written plan document, and has saved plans from efforts to break them up into different pieces in different parts of the country (most often by reason of conflicting state laws), with the resulting administrative costs and burdens. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), *FMC Corp. v. Holliday*, 498 U.S. 52 (1980), *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

The decision below poses the same threat by breaking plans up into myriad sub-plans with different benefits applicable to different employees based on a laborious, fact-intensive investigation into what the employee may have been told by the plan administrator at some time in the past. Whereas ERISA sought to encourage employers to adopt plans by giving them predictability and to streamline the administration of employee benefit plans through national uniformity, the decision below breaks plans up into little pieces – perhaps as small as one

employee – thus exploding the administrative cost and making the benefit cost entirely unpredictable for the employer.

1. With regard to the past, the essence of the problem will be that plan administrators will not know what the terms of their plans are, simply because they will not know which employees were told what at which times in the past. The core of the Congressional scheme under ERISA is the written plan document, which the plan administrator (and any other fiduciary) is duty bound to follow,[10] as this Court explained in detail in *Curtiss-Wright*, 514 U.S. 73, 83-84 (1995). But how does a plan administrator administer a plan according to its written plan document if various amendments to the plan are enforceable in some Circuits but unenforceable in other Circuits against various individual participants for reasons beyond the knowledge of the plan administrator?

This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or

---

[10] "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." ERISA sec. 402(a)(1), 29 U.S.C. § 1102(a)(1). "[A] fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV." ERISA sec. 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

capricious" standard of review; the validity of a plan amendment is a question of law as to which the plan administrator receives no deference. As a result, the plan administrator acts in peril of personal liability for any error in applying the decision below to the history of the plan. Under ERISA, fiduciary liability is personal, not a liability of the plan.

The result will be a flood of claims from employees asserting that they inquired about their benefits but were never told of the employer's reserved right to amend or terminate the plan, such that a given plan amendment may not be enforced against them. The inquiry will be individual and exhausting, even if pursued at the administrative level (using the plan's internal claim and appeal procedures). Even then, plan administrators will be at a loss as to which standard applies – the standard of the Third and Ninth Circuit or the standard of the Fifth, Sixth, Seventh and Eleventh Circuits. Will the outcome depend on where the employee resides or where the plan is administered or some other factor? And will a supposedly uniform national plan then mean different things in different Circuits? What if an employee moves from one Circuit to another – which rule applies?

Given all of these uncertainties, the flood of claims will undoubtedly spill over into the federal courts. Indeed, plan administrators may themselves invoke the jurisdiction of the federal courts under ERISA to bring actions seeking instructions as to what the terms of the plan are, as this Court has

encouraged them to do: "A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

Needless to say, enmeshing the federal courts in individualized inquiries to decide what the terms of all health and welfare plans (and many pension plans) are, as far back as the statute of limitations will reach, represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.[11]

2. For the future, plan administrators will have to decide how to protect themselves against new claims of the type created below, all of them clearly contrary to the purposes of ERISA. For one, plan administrators might simply refuse to answer

---

[11] The interstate reach of so many employee benefit plans, combined with the liberal venue and service of process provisions of ERISA, means that the problem cannot be contained within the Third and Ninth Circuits. ERISA effectively permits an action to be brought in any district where the participant resides, on the ground that the breach occurred there; this is all the more true for retirees, as in this case, who may retire to any circuit regardless of where their former employer conducted business. ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2). All it takes is one participant in the Third or Ninth Circuit to institute a class action and toss a nationwide plan into years of turmoil.

questions, instead referring participants to the plan document and summary plan description and deferring any interpretational questions until an actual claim for benefits is presented.

For another – call it the Miranda approach – plan administrators might require all employees who answer questions from participants to conclude the meeting or telephone conversation by reciting from a card that they would carry in their wallets that "All advice given is based on the current terms of the applicable plan. The employer has reserved the right to amend or terminate the plan." For written correspondence, rubber stamps would be made up and the same legend would be stamped on every written communication to a participant in the plan.

Or, like securities brokers dispensing prospectuses, plan administrators might require that all written and oral communications with participants be followed immediately by sending another copy of the summary plan description to the participant (with proof of mailing for protection, naturally). As the expanding regulations over the years have caused summary plan descriptions to grow plump – 50 pages or more is not unusual – printing, postage and handling will become significant expenses. The tiniest slip-up may be costly.

No one could seriously maintain that it is consistent with the intent of Congress in ERISA to force plan administrators to "clam up," or to recite Miranda-type warnings, or to hand out summary

plan descriptions in connection with every written or oral communication with a participant, especially in view of the fact that Congress laid out a "comprehensive and reticulated" system of disclosure of information to employees that does not include any of those measures. Yet, for the future, there is no other way to satisfy the obligation imposed by the decision below.

Put simply, if the terms of virtually all welfare plans (and many pension plans) are presently uncertain without individualized inquiry into which amendments can be applied to which employees, depending on what they were told and when, *plan administrators need to know now*. And, for the future, if their fiduciary duty under ERISA requires the wasteful, duplicative disclosures necessitated by the decision below, *plan administrators need to know now*.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on

employers, and the time has come to do so again – in a case every bit as compelling as *Curtiss-Wright v. Schoonejongen*. For the reasons set forth above, as well as in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

HOLLIS T. HURD
(*Counsel of Record*)
THE BENEFITS DEPARTMENT
3 Penn Center West,
Suite 120
Pittsburgh, PA 15276
(412) 788-2334

Of Counsel:
ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America